TAN CHONG KEAT

v.

ASIA COMMERCIAL FINANCE (M) BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-03-75-1996]
17 APRIL 2000

BANKRUPTCY: *Bankruptcy notice - Setting aside - Whether notice prematurely issued - Settlement agreements - Conditions and terms - Whether respondent's right to legal proceedings curtailed by settlement agreements*

In August 1988, the respondent obtained judgment against the appellant and two others for RM567,922.24. In June and July 1990, for the purpose of satisfying the appellant's indebtedness to it, the respondent executed two settlement agreements with the appellant and two companies. By the second settlement agreement, the parties *inter alia* agreed that the agreement was no bar to the respondent's demand, proceedings or actions against the debtors, but that the respondent, in any case, would withhold further legal proceedings "for a periof of one year" from the date of the first settlement agreement, which was 22 June 1990.

The arrangements that the parties had come to execute under the two settlement agreements, however, did not fully settle the judgment debt. That being so, on 15 January 1993, the respondent issued a Bankruptcy Notice against the appellant demanding payment of RM372,149.64. The appellant filed two applications to set aside the notice but to no avail. The appellant appealed and argued that the respondent had prematurely issued the Bankruptcy Notice as it's legal right to enforce the judgment sum was put in suspension by the two settlement agreements. The issue before the court was whether the respondent, who had entered into the settlement agreements either in its own name or through a related company, was estopped from enforcing the judgment sum by way of bankruptcy proceedings herein.

Held:
Per Siti Norma Yaakob JCA

[1] The first settlement agreement was dated 22 June 1990, and one year from that date is 21 June 1991. Clearly, the bar to enforce the judgment sum is only good within that period of one year and after 22 June 1991 the right to enforce the judgment sum is revived. The bankruptcy notice here is dated 15 January 1993 and was clearly issued after the one year bar had lapsed.

[2] Since both settlement agreements do not have the effect of settling the judgment sum in full, cl 1 of the second settlement agreement means exactly what it expresses to say, namely, that the respondent's right to obtain full satisfaction of the judgment sum would not be curtailed by the presence of the two settlement agreements.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Dalam bulan Ogos, 1988, responden telah memperolehi penghakiman terhadap perayu dan dua yang lain bagi RM567,922.24. Dalam bulan Jun dan Julai 1990, bagi tujuan menyelesaikan keterhutangan perayu kepadanya, responden telah menyempurnakan dua perjanjian-perjanjian penyelesaian dengan perayu dan dua buah syarikat. Melalui perjanjian penyelesaian kedua, pihak-pihak tersebut antara lainnya bersetuju bahawa perjanjian tersebut tidak menghalang tuntutan, prosiding atau tindakan responden terhadap penghutang-penghutang, tetapi responden, walau apa pun, tidak akan membuat sebarang prosiding undang-undang "for a period of one year" daripada tarikh perjanjian penyelesaian yang pertama, yang mana adalah 22 Jun 1990.

Persetujuan yang telah dicapai bagi menyempurnakan kedua-dua perjanjian penyelesaian tersebut, walaubagaimanapun, tidak menyelesaikan sepenuhnya hutang penghakiman. Oleh yang demikian, pada 15 Januari 1993, responden telah mengeluarkan satu Notis Kebankrapan terhadap perayu menuntut pembayaran sebanyak RM372,149.64. Perayu telah memfailkan dua permohonan untuk mengenepikan notis tersebut tetapi sia-sia sahaja. Perayu telah merayu dan berhujah bahawa responden telah secara pra-masa mengeluarkan notis kebankrapan tersebut oleh kerana haknya yang sah untuk menguatkuasakan jumlah penghakiman tersebut telah digantung oleh kedua-dua perjanjian penyelesaian tersebut. Isu di hadapan mahkamah adalah samada responden, yang telah memasuki perjanjian-perjanjian penyelesaian tersebut samada atas namanya sendiri atau melalui sebuah syarikat yang berkaitan, telah diestop daripada menguatkuasakan jumlah penghakiman melalui prosiding kebankrapan di sini.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] Perjanjian penyelesaian yang pertama bertarikh 22 Jun 1990, dan satu tahun daripada tarikh itu adalah 21 Jun 1991. Jelasnya, halangan untuk menguatkuasakan jumlah penghakiman tersebut adalah hanya baik di dalam tempoh satu tahun itu dan selepas 22 Jun 1991 hak untuk menguatkuasakan jumlah penghakiman tersebut adalah dihidupkan. Notis kebankarapan di sini bertarikh 15 Januari 1993 dan telah dengan jelasnya dikeluarkan selepas luputnya tempoh halangan selama satu tahun itu.

[2] Oleh kerana kedua-dua perjanjian tersebut tidak mempunyai kesan menyelesaikan jumlah penghakiman tersebut sepenuhnya, fasal 1 perjanjian penyelesaian kedua memberi makna yang tepat mengenai apa yang hendak dinyatakannya, iaitu, bahawa hak responden untuk memperolehi penyelesaian sepenuhnya akan jumlah penghakiman tersebut tidak akan disekat oleh kehadiran dua perjanjian penyelesaian tersebut.

[Rayuan ditolak.]

Legislation referred to:
Bankruptcy Rules 1969, rr. 18, 95

For the appellant - Mahinder Singh Dulku (Harjit Singh Harban Singh with him); M/s Harjit Singh Sangay & Co
For the respondent - Khoo Guat Kim; M/s Chew Tan & Lim

[Appeal from High Court, Pulau Pinang; Bankruptcy No: 29-40-1993]

Reported by WA Sharif

JUDGMENT

Siti Norma Yaakob JCA:

On 27 August 1988, the respondent entered judgment against the appellant and two others for the sum of RM567,922.24 and costs in Penang Civil Suit No. 23-228-86. The appellant had guaranteed the payment of money due from the principal debtor, Polite Enterprise Sdn. Bhd., or which the appellant was a director at the material time.

In 1990, in an effort to settle the judgment sum as well as other debts due to the respondent, two related companies of the parties representing their respective interests got together and executed two settlement agreements. The first is a sale and purchase cum joint venture agreement

dated 22 June 1990 ("the first settlement agreement") entered into between Ever Point (M) Sdn. Bhd. ("Ever Point"), a related company of the appellant with Ladang Dahan Setia Sdn. Bnd. ("Ladang Dahan"), a related company of the respondent.

Under that first settlement agreement, Ever Point agreed to sell two pieces of land free of encumbrances to Ladang Dahan for a consideration of RM3.3 million. In turn, Ladang Dahan undertook to develop the property into a housing estate with the net profits to be shared between them. The other terms of the first settlement agreement which are relevant are the arrangements to utilise part of the proceeds of sale amounting to RM2.5 million to redeem the properties which had been charged to MUI Finance Berhad, with the balance of RM800,000 and the other benefits to be derived from the development of the property, to be assigned by Ever Point to the respondent for the purpose of setting part of the debts due to the respondent from a list of debtors whose names appear in the first schedule to the first settlement agreement. Amongst that list is Polite Enterprise Sdn. Bhd. whose indebtedness stood at $1,006,178.77 and against whom judgment had already been entered together with the appellant.

In pursuance of the expressed intention to assign the balance of the proceeds or sale and the profit sharing of the joint venture as stated in the first settlement agreement, Ever Point executed the second settlement agreement with the respondent two weeks later wherein, Ever Point assigned all its rights and benefits under the first settlement agreement to the respondent.

That was on 4 July 1990, and two and a half years later, the respondent issued a bankruptcy notice, the subject matter of this appeal, dated 15 January 1993, against the appellant demanding payment of RM372,149.64, being the balance of the judgment sum. A credit for RM195,772.60 was given and that amount came from the balance of the proceeds of sale that was agreed to be paid out to the respondent under the terms of the first settlement agreement.

The appellant's response to the bankruptcy notice was to file two applications to have it set aside. The first is his affidavit affirmed on 2 September 1993, filed pursuant to r. 95 of the Bankruptcy Rules 1969 ("the Rules") wherein he averred that he has a counterclaim, set-off or cross demand against the amount claimed by the respondent on the basis that the second settlement agreement serves as a settlement of the sum due on the judgment sum.

The second application is his summons in chambers dated 11 July 1994 filed under r. 18 of the Rules and supported by his affidavit affirmed on 8 July 1994, wherein he relied on grounds other than the existence of a counterclaim, set-off or cross demand as averred to in his first application.

Both applications were heard by the senior assistant registrar who dismissed both applications and this was confirmed by the judge on appeal. We are now asked by the appellant to consider whether the latter decision has been correctly made.

In the court below, objections were taken as to whether:

(1) the appellant had raised a valid counterclaim in his first application filed pursuant to r. 95 of the Rules. The trial judge found that there was no satisfactory proof to establish that the appellant had a counterclaim equal to or exceed the amount demanded in the bankruptcy notice.

(2) the bankruptcy notice had stated the exact amount due. The judge held this to be a non issue as the bankruptcy notice is clear as to the amount of the appellant's indebtedness.

(3) the appellant's affidavit supporting his second application under r. 18, contained grounds other than those stated in his affidavit filed under r. 95. The trial judge held that no other valid grounds had been averred to in the affidavit in support.

(4) the judgment sum should be apportioned equally between the three defendants, against whom the judgment was obtained. Expressed in another way, the appellant should only be made to pay 1/3 and not be held solely accountable for the full judgment sum. Again the trial judge held this objection to be a non issue as the appellant, a guarantor for Polite Enterprise Sdn. Bhd., had agreed that he would be solely responsible for settling the judgment sum as seen from the acknowledgment in the second settlement agreement.

None of the above objections were canvassed before us. Instead the one and only issue raised was whether the respondent, who had entered into the two settlement agreements either in its own name or through a related company is estopped from enforcing the judgment sum by way of bankruptcy proceedings.

The appellant contends that the two settlement agreements have the effect of suspending the respondent's legal right to enforce the judgment sum and as such the bankruptcy notice had been prematurely issued. In rebuttal the respondent maintains that whilst the second agreement makes ample provisions for settlement of the judgment sum, forbearance to enforce the

judgment debt is limited in time in that such settlement had to be effected within a year of the date of the first settlement agreement. Since no settlement was reached within the time limited, the respondent's right to enforce the judgment is revived and there is therefore no question of the bankruptcy notice having been issued prematurely.

It is not disputed that both settlement agreements were executed for the sole purpose, *inter alia*, of satisfying the appellant's indebtedness to the respondent. This is clear from the language expressed at preamble (C) and cl. 2.3 (b) of the first settlement agreement and preambles (1), (2), (5) and (7) of the second settlement agreement.

However, the right of the respondent to execute the judgment sum is governed by the general provisions of preamble (3) of the second settlement agreement which reads as follows:

> (3) It is the intention of all parties to this agreement that all assignments made for the purpose of this agreement shall not be construed as a bar to the Assignee's demand, proceedings or action against the Debtors and/or any of the Guarantor.

The assignee here is the respondent whilst Ever Point is the assignor.

Clause 1 of the second settlement agreement goes further to elaborate what preamble (3) had expressed in general terms by limiting the period of forberance to sue on the part of the respondent in the following manner.

> 1. In consequence of the Assignee withholding further legal proceedings for the period or one (1) year from the date of the said agreement against the Debtors and the Guarantors of the debt which have been acknowledged by the Debtors in the Second Schedule thereto, the Assignor as beneficial owner hereby assigns ...

The "said Agreement" in cl. 1 is the first settlement agreement dated 22 June 1990, and one year from that date brings us to 21 June 1991. Clearly the bar to enforce the judgment sum is only good within that period of one year for after 22 June 1991, the right to enforce the judgment sum is revived. In this instance the bankruptcy notice is dated 15 January 1993 and clearly issued after the one year bar had lapsed.

We say that our interpretation of the time bar is correct as both settlement agreements stipulate that the net proceeds from the development of the property would be available to satisfy **part** of the debts due to the respondent from a number of debtors identified in the schedules to both settlement agreements of which the appellant is one. This is clearly stated

at cl. 7.2 of the first settlement agreement and repeated at preamble (7) of the second settlement agreement. We were told that the property remained undeveloped as a housing estate and lack of funds was the cause of the appellant's continued indebtedness.

Since both settlement agreements do not have the effect of settling the judgment sum in full, we consider that cl. 1 of the second settlement agreement means exactly what it expresses to say namely, that the respondent's right to obtain full satisfaction of the judgment sum would not be curtailed by the presence of the two settlement agreements. Whilst both settlement agreements provided the means whereby the appellant was able to settle part of his indebtedness to the respondent within a year, the matter was open as to how the appellant was to settle the balance due on the judgment sum. It must also be remembered that the appellant was not the sole debtor to benefit from the two settlement agreements as other debtors too had a share in the settlement of their respective debts and it is the presence of those other debtors, that we say, accounted for the appellant's indebtedness being met partly and not fully.

As a creditor it stands to reason that the respondent must be assured of its right to claim the balance of the judgment sum due from the appellant. That we say has been taken care of by cl. 1 of the second settlement agreement wherein the appellant had agreed to the respondent withholding from enforcing the judgment sum for a year from the date of the first settlement agreement but after that period, the respondent was free to take any action it deemed fit to recover the balance of the judgment sum. As such during the time bar of one year, the respondent's right to enforce payment of the judgment sum had been in abeyance but once the time bar has expired, his right to go against the appellant personally is revived. Under these circumstances, the appellant cannot take any objection to the issue of the bankruptcy notice by relying on the existence of the two settlement agreements to say that he has a counterclaim against the amount demanded in the bankruptcy notice. Neither can the appellant claim that the respondent is estopped from issuing the bankruptcy notice as by agreement the appellant had consented to effect part settlement within a year and after that period the respondent was free to take any action against the appellant to recover the balance of the judgment sum.

For the reasons that appear in this judgment, we dismiss this appeal with costs and order that the deposit be paid to the respondent to account of its taxed costs.